

STATE OF MICHIGAN
IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals
and the Circuit Court for the County of Wayne)

DESERAI LAWSON, Next Friend
Of ZHIMON BINGHAM, A Minor,

Plaintiff-Appellee,

Supreme Court No: 130872
COA: 256388
LC NO. 03-314614 NO

-vs-

KREATIVE CHILD CARE CENTER, INC.,
a Michigan corporation,

Defendant-Appellant.

SUPPLEMENTAL BRIEF IN SUPPORT OF
APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF
DEFENDANT-APPELLANT KREATIVE CHILD CARE CENTER, INC.

PROOF OF SERVICE

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STATEMENT OF SUPPLEMENTAL ISSUE

WHETHER THE PLAINTIFF'S MINOR'S EXTRA JUDICIAL IDENTIFICATION OF HIS UNCLE AS HIS SEXUAL ABUSER TO HIS MOTHER, AS REPEATED BY THE MOTHER TO THE EMERGENCY ROOM PHYSICIAN, WAS ENCOMPASSED BY THE MEDICAL TREATMENT EXCEPTION TO THE HEARSAY RULE?

Defendant-Appellant says "No."

Plaintiff-Appellee says "Yes."

The trial court said "No."

The Michigan Court of Appeals said "Yes."

SUPPLEMENTAL ARGUMENT

**THE TRIAL COURT PROPERLY GRANTED
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION
WHERE PLAINTIFF FAILED TO PROVIDE ADMISSIBLE
EVIDENCE THAT HER SON WAS SEXUALLY ABUSED;
HER SON'S EXTRA JUDICIAL IDENTIFICATION OF HIS
UNCLE AS THE ABUSER TO HIS MOTHER WAS NOT
ENCOMPASSED BY THE MEDICAL TREATMENT
EXCEPTION TO THE HEARSAY RULE.**

A. Introduction to Argument

In its Order of July 21, 2006, the Michigan Supreme Court granted oral arguments upon Defendant's Application for Leave to Appeal and permitted the parties to file Supplemental Briefs to further address the issue of:

Whether statements made by plaintiff's son to plaintiff, identifying his attacker, and then repeated by plaintiff to her son's physician, are admissible under MRE 803(4) as '[s]tatements made for the purposes of medical treatment or diagnosis...'

Defendant continues to assert that the statements at issue constitute inadmissible hearsay which were insufficient to sustain the Plaintiff's burden of production in responding to Defendant's Motion for Summary Disposition.

B. Supplemental Discussion

The analysis contained in Argument I of Defendant's Application for Leave to Appeal is exhaustive. However, the most significant, if not controlling point, is that Rule 803(4) of the Michigan Rules of Evidence added a required element beyond the otherwise analogous medical treatment exception to the hearsay rule contained in Rule 803(4) of the Federal Rules of Evidence, that the out of court statements be made in actual "connection with treatment." MRE 803(4); People v LaLone, 432 Mich 103, 114-115 (1989). As the LaLone Court specifically observed:

The federal rule permits the introduction of '[statements] made for purposes of medical diagnosis or treatment,' while the Michigan rule requires that the diagnosis be '**in connection with treatment.**'

432 Mich at 114-115 [emphasis added].

Strictly enforcing the more strict and narrow language of MRE 803(4), the focus here must be upon the factual context in which Plaintiff's minor, Zhimon Lawson, identified his uncle Fred Marks as the individual who purportedly sexually abused him by touching his anus. In addition to this factual context, the child's **motive** in offering the identification to his mother must be explored. As the United States Court of Appeals for the Eighth Circuit observed in United States v Peneaux, 432 F3d 882, 894 (8th Cir. 2005) in applying the even more liberally worded FRE 803(4):

The more difficult Rule 803(4) question relates to [the child's] motive. The motive requirement means that the victim must have had a "selfish subjective motive of receiving proper medical treatment" or the state of mind of someone seeking medical treatment. *United States v. Turning Bear*, 357 F.3d 730, 739 (8th Cir. 2004); *Gabe*, 237 F.3d at 958. To satisfy this rule, a proponent must show that a child understands "the medical significance of being truthful." *United States v. Sumner*, 204 F.3d 1182, 1186 (8th Cir. 2000). This requirement is especially important in sexual abuse cases since "not even an adult necessarily understands the connection between a sex abuser's identity and her medical treatment." *Gabe*, 237 F.3d at 958.

432 F.3d at 894.

It is for these reasons that this action falls outside the scope of the Supreme Court's Opinion in People v Meeboer, 439 Mich 310 (1992), which involved identification of the sexual assailant directly by the child-victim to the medical provider.

In this regard, the Michigan Court of Appeals' Opinion below failed to recognize that Zhimon Lawson's statements identifying Marks to his mother were not medically relevant in the mind of the child; that is, unlike his complaints of pain, the child did not identify his uncle for the

subjective motive of receiving proper medical treatment. For, at the age of two, the child did not understand the medical significance of a truthful identification of the assailant (e.g., to identify the source of a possible transmission of a sexually transmitted disease). United States v Peneaux, supra. Rather, the statement was made while the child was taking a bath. This is the very reason why the trial court distinguished between the child's complaint of pain and the subsequent identification of the uncle who touched his rectum. Arguably, neither statement was made in actual "connection with medical treatment." Certainly, the latter statement was not made with the requisite factual context or subjective motivation.

Unless the child's statements to his mother are fully encompassed by MRE 803(4), the mother's statements to the emergency room physician are also inadmissible because the mother did not have "firsthand knowledge" as to whether Mr. Marks improperly touched the child. People v Allen, 429 Mich 558, 567 (1988); MRE 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). Indeed, it is undisputed that the mother did not provide the physician with any firsthand knowledge regarding the alleged abuse. She only relayed the child's nonjudicial statements to her.

Finally, federal authority relied upon by Plaintiff, such as Galindo v United States, 630 A.2d 202 (D.C. 1993) is inapplicable because they do not involve the memorialization of the hearsay statements into medical records -- a third level of hearsay. In this regard, the District of Columbia Court of Appeals in Jenkins v United States, 870 A.2d 27, 38 held that Galindo "left open" the question of whether the medical treatment exception to the hearsay rule extended to indirect descriptions of sexual assaults contained within a medical record:

We must agree with appellant to this extent: *Galindo* did not expressly deal with second-level hearsay. It also is true that, because

the crucial witnesses in *Galindo* testified at trial, our “special relationship” analysis in that opinion did not come to grips with the evidentiary question presented here: whether a child’s second-level hearsay description of her sexual assault contained in a medical record is admissible under the medical diagnosis exception to the hearsay rule. Although *Galindo* – in a stretch – might be read to permit, or at least not bar, admission of a medical record containing such second-level hearsay, without related live testimony, a more careful reading would conclude that this court left that question open.

870 A2d at 38.

Beyond the inapplicability of the Plaintiff’s authority, the controlling point remains that the then two year old minor’s underlying statement that his uncle improperly touched his rectum was not made “in connection with” medical treatment or with the understanding that it was necessary for proper medical treatment. The child had just finished taking a bath four days after the alleged incident and did not understand the ramifications of sexually transmitted diseases. The trial court properly dissected the child’s statements to his mother for purposes of applying MRE 803(4). The trial court’s analysis did not constitute an abuse of discretion and must be reinstated by the Michigan Supreme Court.

Respectfully submitted,

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